conducted at the premises in question and was in all probability just a "runner". It is also, perhaps, significant that neither the 5th accused (the father of the 1st appellant) nor any one else connected with the premises has apparently taken any steps to pay the fine imposed upon this appellant. This would seem to support the view that he was not regarded by the management (whoever precisely they are) to be a person of any considerable importance in their scheme of things.

That being so, I am disposed to consider the fine of $2,500 to be excessive; and, in my opinion, justice will be done if the fine is reduced to one of $500, in default, a sentence of six weeks' imprisonment. And I so order.

In the event of the sentence of imprisonment becoming operative, the period of 18 days which this appellant has already spent in prison will be deducted from the sentence now imposed.

*Order accordingly.*

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## NEO CHAN ENG v. KOH YONG HOE

[O. C. J. (Neal J.) June 28, 1960]

[J. B. — Civil Suit No. 73 of 1960]

*Negligence — Onus of proving — Failure to discharge — Absence of medical evidence — Whether inference can be drawn without any evidence on record.*

*Practice and Procedure — Use of interlocutory procedures — Preparation of case — Observations.*

The onus of proving negligence on the part of the defendant is on the plaintiff. Where he fails to discharge it either by his own evidence or by cross-examination of the defendant or by admission made by the defendant his claim fails.

Observations on using the procedure of admissions and interrogatories and other interlocutory procedures in Johore, and inadequate preparation of case on the part of counsel.

*Cases referred to:—*

(1) *Low Say Thoot* v. *Sivasamy* F.M. Civil Appeal No. 8 of 1957, unreported.

(2) *Loo Soo Kwan* v. *Rajamah & Ors.* F.M. Civil Appeal No. 9 of 1957, unreported.

(3) *Marshall* v. *Owners of S.S. Wild Rose* [1910] A.C. 486, 487.

(4) *Owners of Ship Swansea* v. *Jessie Mary Rice & Millicent Rice* [1912] A.C. 238, 239.

ACTION FOR DAMAGES.

*Robert S. A. Hsieh* for the plaintiff.

*J. D. Donnelly* for the defendant.

**Neal J.:** The plaintiff by her amended Statement stated that on the 12th January, 1957, at about 5 p.m. she was on her way from her home to the shophouse opposite her house, that she had reached the grass verge on the other side of Jalan Scudai when a motor lorry, owned and driven by the defendant, suddenly and without warning hit and knocked her down, and that the lorry was being driven negligently and recklessly by the defendant. She proceeded to give particulars of the negligence. She claimed that as a result of being knocked down and as a result of the negligence of the defendant she suffered damages. At this stage I find it unnecessary to refer to the details of the damages she suffered.

The defendant denied all these allegations and stated that the accident was solely caused, or contributed to, by the negligence of the plaintiff, and he proceeded to give details of such alleged negligence.

The plaintiff in her evidence-in-chief, when asked by her own Counsel to give in detail what happened, contented herself with the following terse statement "When I was on the other side a lorry came along and knocked me down and my leg was fractured. When knocked down I became unconscious". In her cross-examination she was pressed for details, and she placed the point of impact on what I think on the evidence could be adequately described as the grass verge on the left hand side of the road, very close to the point pointed out by the defendant as the spot where after the accident she had lain.

The defendant in his evidence said that he was proceeding between 25 and 28 miles per hour in his estimation, but at any rate under 30 miles per hour — the speed limit for the area. Shortly after two lorries had passed him, a girl ran out from behind the last one and ran across the road in front of him. He swerved to the left, being unable to swerve to the right because of a vehicle coming from the opposite direction. (In his statement to the police he stated he swerved to the right). At that time his lorry was laden with 5 tons of flour. He braked and the vehicle finished up (although he does not in terms say this, it must be inferred from his evidence and the fact that he did not contradict the evidence of the police officer) at the spot where it was found when the police arrived. This evidence and the police investigation summarise the whole of the evidence before me on the question of negligence.

In addition to the fact that the plaintiff's evidence was unsatisfactory in that in her examination-in-chief she said she saw no traffic when she looked before crossing, in her cross-examination she said she saw a vehicle which she estimated to be away from the witness box to the centre of the causeway. Again her evidence as to her income and how it was made up in detail was quite unbelievable, and I was unable to accept her evidence as to what happened because of the evidence of the police investigating officer that there were no marks on the road or grass verge other than the ones he marked on the plan. In my opinion a lorry laden with 5 tons of flour would leave marks on the grass verge in the circumstances and the absence of any such marks establishes the incorrectness of the plaintiff's version of the accident, and there is nothing in the evidence of the defendant to which I could point as evidence of negligence.

On the other hand I cannot accept, in the light of the medical evidence, the defendant's version without the assistance of some medical evidence in respect of the actual type of the

fracture. Unfortunately this evidence was not forthcoming. Although in my own mind I could make a very very close guess as to what actually did happen, there can be no doubt that I am not entitled to do so. If any authority be required for this proposition as a statement of law, it can be found in the unreported (so far as I know) decisions of the Court of Appeal in *Low Say Thoot* v. *Sivasamy*[1] and *Loo Soo Kwan* v. *Rajamah & 5 Ors.*[2]. If further authority be required for this proposition it can be found, in my opinion, in the words of Lord Loreburn L.C. in *Marshall* v. *Owners of S.S. Wild Rose*[3]:

"Now in the affairs of life, where much is often obscure, men have to draw inferences of fact from slender premises. A plaintiff or claimant must prove his case. The burden is upon him. But this does not mean that he must demonstrate his case. It only means that if there is no evidence in his favour upon which a reasonable man can act he will fail. If the evidence, though slender, is yet sufficient to make a reasonable man conclude that in fact this man fell into the water by accident, and so was drowned, then the case is proved".

Admittedly this was a claim against an employer for workman's compensation, nevertheless the *dictum* which I have quoted has, in my opinion, general application. Again the same Judge in *Owners of Ship Swansea* v. *Jessie Mary Rice and Millicent Rice*[4] said:—

"What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other".

And Lord Shaw of Dunfermline, in the same case at p. 241, drew attention to the distinction between an inference in the ordinary sense and mere conjecture. In the judgment of their Lordships in the latter case they held that there was evidence which raised an inference, to them irresistible, that there must have been an accident. This again was a case for workman's compensation.

The onus of proving negligence on the part of the defendant was on the plaintiff, and the plaintiff failed to discharge the onus either by her own evidence or by cross-examination of the defendant or by admissions made by the defendant. I am therefore forced with regret to dismiss her claim. I have said "with regret" because I feel that had the plaintiff given the correct version, whilst she may have been found guilty of contributory negligence, she might have succeeded to some extent.

I have said on many occasions while sitting in Johore that litigants by using the procedure of admissions and interrogatories could well strengthen their case and save the time of the Court. The use of this and other interlocutory procedures is completely absent in Johore, and I have found that these procedures are much more frequently used in the States on the East Coast of Malaya.

There is one other matter to which I think it is my duty to refer and that is that, although the plaintiff complained of permanent injuries, there is no evidence of any medical examination after her discharge as an out-patient until she had completed her evidence, that is to say, until she was examined at 4 p.m. on the afternoon of the day on which she gave her evidence. Again at the commencement of the trial I was informed by counsel for the plaintiff that the Plan and Key were admitted. On confirmation of this I admitted them and they were accordingly marked as exhibits. Yet at the luncheon adjournment on the second day counsel for the defendant had the measurements on the Plan checked and there were found to be considerable discrepancies in the figures. In view of my decision the question does not arise as to whether or not, in the light of the admission of the Plan and the correctness of the Key by the defence counsel, these discrepancies could be taken into account.

My object in drawing attention to this is that I have noticed during the time I have been in Johore a number of matters which, I am afraid, point to inadequate preparation on the part of counsel. I have said nothing in the past in the hope that the matter would be remedied. I mention it now in the hope that, in the interests of litigants, the necessity for such remarks will not arise in the future.

There will be judgment for the defendant with costs. During the course of the hearing, namely when I granted leave to amend the Statement of Claim, I deferred the question of costs. The effect of my decision is that it becomes no longer necessary for me to make any order in respect of the costs occasioned by the amendment.

*Judgment for the defendant.*

Solicitors: *Boswell, Hsieh & Lim; Battenberg & Talma.*

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## ONG YOK CHU & ANOR. v. YONG TECK FONG & ANOR.

[O. C. J. (Ismail Khan J.) June 29, 1960]

[Malacca — Originating Summons No. 24 of 1960]

*Practice and Procedure — Originating Summons — Question of fact — Declaration of rights — R.S.C., 1957, O.54A r.1 and O.55 r.3(1) — Correct procedure.*

In this case the plaintiffs alleged that the defendants had sold them a whole piece of land but owing to a mistake only a half undivided share in the said land was conveyed to them under the deed of conveyance. They applied by originating summons for a declaration that (a) they were the beneficial owners of the said piece of land, and (b) an order for the transfer by the defendants of a half undivided share in the said land to the plaintiffs.

It was urged for the plaintiffs that as the defendants had sold the whole of the land but had conveyed only a half share thereof to them the defendants were the trustees of the remaining undivided share for them, and that the procedure set out in O. 55 r. 3(1) was available to them.

**Held:** (1) it is contrary to all decided authorities to try disputed issues of fact on an originating summons;

(2) the plaintiffs should they so desire to obtain the relief they seek ought to proceed by writ.